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Supreme Court, U.S.
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Case No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD SINGLETON
Petitioner,

vs.

STATE OF FLORIDA DEPARTMENT OF JUVENILE JUSTICE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the trial court improperly instructed the jury on the plaintiff's burden in the case involving racial discrimination in employment.

LIST OF PARTIES

All parties to the proceeding are as follows:

RICHARD SINGLETON, Petitioner

STATE OF FLORIDA DEPARTMENT OF JUVENILE JUSTICE, Respondent

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Richard Singleton, respectfully prays that a writ of certiorari issue to review the opinions below.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Eleventh Circuit appears at Appendix A to the petition and is unpublished.

JURISDICTION

The jurisdiction of the Supreme Court of The United States is invoked pursuant to 28 U.S.C. § 1254(1) to review the final judgment of the United States Court of Appeals for the Eleventh Circuit rendered on May 15, 2009.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Courts Below

On March 2, 2006, Notice of Removal was filed by the State of Florida, Department of Juvenile Justice, removing Singleton's Complaint from the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida, Case No. 06-CA-446 (R1-1). On March 10, 2006, the Department filed is Answer and Affirmative Defenses to Complaint (R1-4-1). On October 31, 2006, the Department filed a Motion for Summary Judgment (R1-19-1-2). On November 21, 2006, Singleton filed a Response to the Motion for Summary Judgment (R1-27-1-10). On February 12, 2007, the trial court entered an Order denying summary judgment (R1-42-1-12). In denying the summary judgment, the court found that the plainitff had offered evidence that two white supervisors at the JJOC facility, a Captain and the Assistant Warden, had both had altercations involving physical contact with black subordinate employees. Neither one of the white supervisors was disciplined in any way (R1-42-10). On May 25, 2007, Proposed Jury Instructions were filed by the plaintiff (R1-61-1). On May 25, 2007, Proposed Jury Instructions were filed by the defendant, Florida Department of Juvenile Justice (R1-67-1). On June 4, 2007, Attorney for Plaintiff, Erika Bush, filed her Emergency Motion to Withdraw as Attorney (R1-79-1). On June 5, 2007, the District Court granted Attorney for Plaintiff, Erica Bush's

Emergency Motion to Withdraw as Counsel (R1-82-1). On July 13, 2007, the undersigned counsel filed his Notice of Appearance on behalf of Plaintiff, Richard Singleton (R1-89-1). On January 31, 2008, the U.S. District Court entered its Order Setting Trial for May 12, 2008 (R1-110-1). On May 12, 2008, a jury was selected for trial and on May15, 2008, a jury verdict was entered in favor of the defendant (R1-127-1). On June 2, 2008, a Notice of Appeal was timely filed (R1-132-1).

B. Statement of the Facts

The plaintiff called five witnesses: Randy Williams, Curtis Ellis, Brandon Jones, Richard Singleton and Janice Moore.

1. Testimony of Randy Williams

Randy Williams testified that he was the Assistant Superintendent at the Jackson Juvenile Offender Corrections Center in Marianna, Florida (R1-144-30-31). Williams became employed with the Department of Juvenile Justice at that facility in July of 1998 (R1-144-32). Williams was originally hired by Superintendent Dale Edwards, a white male (R1-144-33). Williams worked with Edwards for approximately a year before Richard Singleton was hired to succeed Edwards (R1-144-33). Williams worked with Singleton from May of 1999 until June of 2004 (R1-144-34). Williams testified John Tallon was the Regional Director. Williams observed Mr. Tallon treated white employees under his supervision in a more

professional manner than he treated Williams and Singleton.

Williams also supervised an employee named James Lowery and was aware of his disciplinary history involving oral reprimands, written reprimands and at least one suspension (R1-144-35). Lowery had many more problems getting along with his black coworkers than non-blacks (R1-144-38). Williams also observed situations where John Tallon, the Regional Director, overruled Mr. Singleton's disciplinary recommendations. Williams observed a pattern where Tallon would overrule a recommendation Singleton made for the discipline of a white employee, however, when Singleton made a recommendation to discipline African-American employees, Tallon did not show the same concern he did for white employees. Tallon would rubberstamp decisions to terminate or discipline African-American employees. Williams recalled June 28, 2004, an incident involving Mr. Singleton and an employee named Della Barnes (R1-144-40). Williams attempted to review the security tapes to see if they had recorded the incident. Tallon instructed Williams not to review the tape (R1-144-40-41). After Singleton was removed as Superintendent, Williams was informed that he was being offered the opportunity to continue in his employment there only as a Juvenile Corrections Officer without supervisory responsibilities. Rather than accept it, Williams resigned his position (R1-144-40-41). Williams also testified that from what he had observed in the handling of Mr. Singleton's

employment there that race had played a significant role in what happened to Mr. Singleton (R1-144-45). Randy Williams testified on redirect that if the Assistant Supervisor of the facility pushed a young white man on the back to tell him where to go that he would expect discipline (R1-144-63). Mr. Williams also testified that if a black male, group team leader, such as the position held by Mr. Lowery, was to ever have a confrontation with a younger, white corrections officer, that he would expect some form of discipline (R1-144-64). Williams admitted it would make no difference whether the employee touched or pushed was male or female (R1-144-65). Williams also testified that Mr. Singleton was ultimately replaced by a white female (R1-144-66).

2. Testimony of Curtis Ellis

Curtis Ellis testified that he was a Jacksonville corrections officer who holds the position of Juvenile Justice Counselor/Supervisor. Ellis has been employed at JJOCC for 9 years (R1-144-68). Ellis held the position of Juvenile Justice Residential Officer in February of 2005 (R1-144-68). James Lowery was Ellis' supervisor in February of 2005. Ellis testified about an incident regarding Mr. Lowery. Ellis testified that during an incident with his Supervisor, James Lowery, Lowery reached down, grabbed his arm, and said, hey, I'm not through talking with you, yet. (R1-144-70-71). Ellis turned around, pointed his finger at him and said, let me tell you something, don't you ever put your hand on me like that again (R1-

144-71). This incident was overheard by Willie Ross, another supervisor. Ellis met with a Superintendent, Mary Zahasky, and the Assistant Superintendent, Warren Reeves, regarding the incident. Zahasky and Reeves are both white. After the meeting with Zahasky and Reeves, Lowery was allowed to apologize to Ellis for the incident.

3. Testimony of Brandon Jones

Brandon Jones testified for the plaintiff that he was born in 1984 and that he became employed with the Department of Juvenile Justice at JJOCC in April of 2005. Jones held the position of Juvenile Justice Residential Officer (R1-144-87). Jones was hired in April of 2005 and had to complete a probationary period before he could get selected as a career-service employee (R1-144-88). Jones testified that Warren Reeves was the Assistant Superintendent of JJOCC, in December of 2005 (R1-144-88). Reeves is 6 foot 5 inches, 300 pounds (R1-144-89). Jones testified about an incident where Reeves came up from behind him, put his hand on his back, and pushed Jones from the concrete sidewalk into the parking lot. Supervisor Willy Ross set up a meeting with Reeves and Mary Zahasky in the Superintendant's Office to discuss the incident (R1-144-92). Reeves apologized for pushing Jones in the rain (R1-144-92). Jones testified he was intimidated attending the meeting because his job was on the line (R1-144-93).

4. Testimony of Janice Moore

Janice Moore testified for the plaintiff as to Mr. Singleton's care for the children under his custody and control that the children were his most important concern (R2-145-14).

5. Testimony of Richard Singleton

Richard Singleton testified that he was born in Sumter, South Carolina, in 1935. Singleton attended school in Sumter, South Carolina. The schools of Sumter, South Carolina were segregated at that time (R2-145-23-24). Singleton attended an integrated school in Glen Falls, New York, for the third grade through eighth grade. He was treated with respect and kindness, accepted in the community, he was a leader, an A-B student, he excelled in sports (R2-145-25). After leaving Glen Falls, Singleton returned to Lincoln High School in Sumter, South Carolina, where he graduated in 1954. After graduation, Singleton received a four-year scholarship to play football and baseball at South Carolina State College. South Carolina State College is a historically black university. Singleton testified he would not have been allowed to attend the University of South Carolina or the Citadel because of race (R2-145-26). Singleton participated in the ROTC Program at South Carolina State College and went into a military career for thirty years (R2-145-27). While in Viet Nam, Singleton served as Provost Marshall in the 199th Light Infantry Division, responsible for Prisoner of War camps. After Viet Nam, Singleton

was assigned to Fort Leavenworth, where he was responsible for 1,400 prisoners (R2-145-28-29). While in Missouri, he received a Masters degree in Public Administration. Singleton made full Colonel in the United States Army in 1980 and retired in 1988 (R2-145-31). Singleton took a job as Warden of the Maryland House of Corrections. The facility had not passed an audit inspection in twelve years. The facility passed its inspection. Singleton next decided to run for Sheriff of Fairfax County, Virginia. Singleton had a business partnership in a company called Youth Services International, which was a private business listed on the NASDAQ (R2-145-32). Singleton next met the owners of an at-risk youth company called Tree Springs and he went to work for them as a Regional Director. As Regional Director, he was responsible for facilities in Florida and Georgia (R2-145-32). At this time, Singleton met an individual named Rex Uberman who was an employee at the Florida Department of Juvenile Justice. Mr. Uberman hired Singleton to be the Superintendent at JJOCC (R2-145-33-34). Singleton began employment June 19, 1999. His initial Supervisor was Rex Uberman (R2-145-35). There was a reorganization and John Tallon became his Regional Supervisor. Singleton testified that when he took over JJOCC in June of 1999, it was in poor shape (R2-145-36). He was audited five times in two years, which was contrary to DJJ policy of only calling for one audit per year (R2-145-36). Singleton admitted he had had an okay relationship with Tallon prior to him becoming the Director (R2-145-38). The relationship changed like night and day after

Singleton became a subordinate to Tallon (R2-145-38). Tallon sent Program Monitor Bill Yates on a weekly basis to Singleton's facility to try and find anything negative he could use against Singleton. Singleton complained to Bill Yates one day. After that, Yates began to slack off (R2-145-39). In February of 2002, the JJOCC facility was rated a deemed facility. Deemed status is reserved for the top twenty-four of the four hundred and some-odd facilities that DJJ administers. After Singleton's facility achieved deemed status, Tallon rated Singleton a 2 out of a 5. In June of 2004, Singleton was performing the duties of Warren Reeves, one of his Assistant Superintendents who had resigned his post. One of Reeves's duties was support services for this facility. This included the kitchen. On June 28, 2004, Singleton was in the mess hall because he did not have an Assistant Superintendent to do that (R2-145-43). After leaving the kitchen, Singleton went to the laundry room. There, he encountered Della Barnes and noticed that Ms. Barnes had her arms folded, rolling her eyes and leaning up against the wall while he was giving instructions to the employees. Singleton said to Barnes, "Ms. Barnes you are being very disrespectful and rude; you are not listening to what the old Colonel is telling you. You need to listen up" (R2-145-44). She straightened up and he said, "this place is not going to look like a ghetto you all." Again, Singleton noticed that Ms. Barnes was rolling her eyes again, her hand in her pocket. Singleton went over and said, "Ms. Barnes, you know you and I have never had any problems, why are you doing this?" And he reached over and

said, "you don't have to act like this, please take your hand out of your pocket." Singleton then reached over very gently, looked her in the eyes and said, "please remove your hand from your pocket, you are being disrespectful again." Singleton removed her hand from her pocket (R2-145-45). Singleton then left the facility to go to his residence, which was Staff Housing on the compound (R2-145-45). When he returned, he noticed a police officer. The police officer approached and said Colonel you are being charged with simple battery (R2-145-45-46). Singleton next learned from Ed Leeks that he was being relieved of his command by orders of John Tallon for placing his hands on Della Barnes. Singleton was instructed to turn over his keys and ID card (R2-145-46). Singleton has admitted that this was not an acceptable thing to do (R2-145-49). Singleton believed that the incident between Ellis and Lowery was more confrontational than the incident involving him and Ms. Barnes (R2-145-49). The State Attorney dismissed the case, filing a No Information on October 26, 2004 (R2-145-51). On June 28, 2004, the same day of the incident with Della Barnes, Singleton received a Memo indicating that Ed Leeks would be the Acting Superintendent for JJOCC and another Memo was issued from David Mooneyham, Security Supervisor, stating that Singleton should not be allowed on the compound unless authorized by John Tallon or Ed Leeks (R2-145-56). On July 9, 2004, Singleton received official confirmation that he had been terminated from his position as Superintendent at JJOCC signed by John Tallon (R2-145-56-57).

Singleton had to relocate to a hotel because he had nowhere to stay, since he lived on the compound and had been banished from the compound (R2-145-58). Singleton went to see Charles Chervanik. Chervanik was Assistant Secretary of Facilities for the Department of Juvenile Justice in Tallahassee. Chervanik is Caucasian and is John Tallon's boss (R2-145-58). The Inspector General was assigned to investigate the incident (R2-145-62). On July 22, 2004, the Inspector General's report was completed. This was after Singleton had already been fired. Singleton was never at any time given the opportunity to apologize to Ms. Barnes (R2-145-64). After his termination, Singleton learned of the incident between Curtis Ellis and Mr. Lowery (R2-145-66). Singleton also learned about the incident involving Mr. Jones and Warren Reeves (R2-145-67). Tallon didn't take any corrective action against Lowery for grabbing Ellis. There was no corrective action taken against Reeves for pushing Jones (R2-145-68). The individuals were allowed to keep their jobs. Warren Reeves, who had left the facility, later returned and is now holding a position of Superintendent (R2-145-68). Randy Williams and Singleton are both black and were both replaced by white people (R2-145-69).

Plaintiff rested his case the second day of trial (R2-145-155).

Defendant called Ed Leeks as its first witness. Mr. Leeks testified he was Superintendent of the Main Campus on the Department of Juvenile Justice compound known

as Dozier School for Boys. JJOCC, the facility run by Singleton was also on the campus of Dozier, but was a separate facility (R2-145-156). Leeks was hired by John Tallon in the position of Superintendent at Dozier (R2-145-157).

Defendant next called Oliver Jones. Oliver Jones was a Superintendent of Pensacola Bay Boys with the Department of Justice. Jones has been an employee of the Department of Justice for fifteen years (R2-145-162). Jones stated he did not know of any instances in which John Tallon discriminated against him or took actions based on his race (R2-145-163). Jones testified that Tallon treated him professionally and courteously (R2-145-166).

Defendant next called William Yates. Mr. Yates was employed with the Department of Juvenile Justice from 1994 until 2005, when he retired (R2-145-167). Yates served under the command of John Tallon (R2-145-167). Yates worked in Quality Assurance. Yates was a program monitor that conducting monitoring of the JJOCC facility operated by the Plalintiff, Mr. Singleton (R2-145-169). Mr. Yates could not recall if Mr. Tallon had ever ordered him to monitor the JJOCC facility while Singleton was Superintendent (R2-145-174).

The defendant next called Charles Chervanik. Chervanik was employed by the Department of Juvenile Justice as the Assistant Secretary for Residential Services. Chervanik left

the Department in January of 2007 (R2-145-175). Chervanik knew John Tallon as the Regional Director at the Department of Juvenile Justice while he was Assistant Secretary (R2-145-177). Chervanik was aware of the basis for the termination of Richard Singleton (R2-145-178). Chervanik was on the EEOC panel at the Department of Juvenile Justice that reviewed Singleton's complaint and found there was no cause for discrimination (R2-145-181). On cross examination of Chervanik admitted that everyone in the chain of command above Richard Singleton in the decision-making process was a white male (R2-145-183-184). Chervanik admitted that John Tallon made a recommendation to terminate Richard Singleton (R2-145-185).

The defense called Charles Smith. Charles Smith is a former employee of the Department of Juvenile Justice. Smith was employed at JJOCC when Singleton was a Superintendent (R2-145-189-190). Smith testified that one time Singleton called his home on Sunday and was very abusive to him using profane language (R2-145-191). Smith also testified that he requested a change in his work schedule to accommodate the fact that his wife was deployed in Iraq. Smith requested an 8-to-4 p.m. schedule with a working lunch. Singleton had recommended he be terminated because he was unable to work until 5 p.m. on a regular basis as required. John Tallon reversed that decision (R2-145-192-193).

The defense next called David Mooneyham. Mooneyham testified that he is a retired employee who was employed by the Department from 1972

until February 2008. Mooneyham was an Assistant Superintendent Program Administrator. On June 28, 2004, the day of Richard Singleton and Della Barnes' incident, Mooneyham was a Security Supervisor for Dozier School for Boys (R2-145-195-196). Mooneyham reported to Superintendent Ed Leeks. Mooneyham was there when Singleton had to leave his living premises at his residence on the campus of JJOCC. Mooneyham received Singleton's security badge, keys, etc. The interaction with Singleton was very courteous (R2-145-199).

The defense next called Noah Nelson. Nelson was formerly employed as a Juvenile Corrections Officer at JJOCC while Richard Singleton was the Superintendent. There was an incident where Singleton brushed his hand against Nelson's chin because Singleton felt that Nelson needed to shave (R2-145-203). Nelson filed a police report for battery because of the unwanted touch. This incident took place on or about July 10, 2000, at 9:30 a.m. (R2-145-205). Nelson admitted on cross examination that no such incident every occurred again and there was never any repercussion or retaliation from Mr. Singleton regarding this incident (R2-145-207).

The defense next called John Jackson. Jackson was also a former employee of JJOCC, having worked there from 1998 to 2002. Jackson also testified that he witnessed the incident involving Nelson (R2-145-211-212). The defense then moved for Judgment as a Matter of Law (R2-145-215-217).

The Court presented the proposed Jury Instructions without objection from plaintiff or defendant. (R2-146-5).

The defense next called Della Barnes. Barnes was employed by Trinity Food Services to work in the kitchen at the JJOCC facility. Barnes held the position of Food Service Supervisor (R2-146-12). Barnes testified that Singleton said to her, get your hand out of your pocket and slapped her whole hand out of her pocket (R2-146-15). Barnes testified it was her idea to call the police (R2-146-17). John Tallon did not tell her to call the police (R2-146-18). Barnes filed a police report (R2-146-20). Barnes' hand was in her pants pocket (R2-146-23). The State Attorney dropped the charges against Singleton (R2-146-24).

Defendant next called Derrick Elias. Elias was the EEO Senior Management Analyst II employed by the Department of Juvenile Justice who handled the Equal Opportunity Office of the Department (R2-146-26). He has been employed by the Department of Juvenile Justice since 1994. Elias reviewed the EEO Complaint of Richard Singleton (R2-146-36-37). Elias confirmed that the Internal Investigation by DJJ EEO Office found a no cause determination (R2-146-38).

The Defense next called Warren Reeves. Reeves testified he had been employed by the DJJ for 20 years, total. He currently is the Superintendent of JJOCC, the same position held by Singleton (R2-146-58). Reeves testified regarding an incident involving Brandon Jones. Reeves stated he put his hand on Brandon's shoulder and kind of just walked out that direction

with him and was still talking (R2-146-64). Reeves denied shoving Jones off the curb (R2-146-65). Reeves apologized to Jones for the incident (R2-146-72). Reeves also testified about the touching incident involving a white male named James Lowery touching a black male by the name of Ellis. Reeves attended a meeting with Ellis and Lowery with Superintendent Zahasky (R2-146-76). Reeves testified Lowery and Ellis were allowed to talk out the issue and resolve the matter (R2-146-78). On cross examination Reeves testified about an email dated March 1, 2005, involving an Internal Investigation over the Lowery-and-Ellis Incident (R2-146-82). Reeves testified that he authored a Memo recommending that Lowery be demoted from his position as Supervisor based on the precedent established by a similar incident last year (R2-146-84). Reeves was Lowery's direct Supervisor (R2-146-85). Reeves gave Lowery a 4.67-out-of-5 evaluation, immediately after the Ellis Incident (R2-146-86). Reeves testified he is 6 foot 4, 320 pounds (R2-146-86). Reeves replaced Randy Williams as Assistant Superintendent (R2-146-86).

The jury was given the following instruction on the issue of liability:

> In order to prevail on his claim, the appellant must prove each of the following facts by a preponderance of the evidence:
>
> First, that the plaintiff was discharged from

> employment by the defendant; and
>
> Second, that the plaintiff's race was a substantial or motivating factor that promoted the defendant to take that action (R2-146-144).

The jury returned a verdict of no liability (R2-147-2).

REASONS FOR GRANTING THE WRIT

WHETHER THE TRIAL COURT IMPROPERLY INSTRUCTED THE JURY ON THE PLAINTIFF'S BURDEN IN A CASE INVOLVING RACIAL DISCRIMINATION IN EMPLOYMENT.

Appellant brought this action as a claim of racial discrimination alleging that he was illegally terminated from his position as Superintendent of a juvenile offender facility by a racially-motivated, white supervisor named John Tallon. Prior to the trial in this case, the defendant had filed a Motion for Summary Judgment. In denying the Defendant's Motion for Summary Judgment, the trial court stated:

> Plaintiff has not presented any direct evidence that he was terminated because of his race, therefore, to prove a *prima facie* case of race discrimination, plaintiff must rely upon the indirect method established in *McDonald Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under the *McDonald Douglas* framework, one way for the plaintiff to establish a *prima facie* case is to show that (1) "he belongs to a racial minority; (2) he was subjected to adverse job action; (3) his employer treated similarly-

situated employees outside of his classification more favorably; and (4) he was qualified to do the job." *Holifield v. Reno*, 115 F. 3d 1555, 1562 (11th Cir. 1997) (R1-42-8-9).

If plaintiff establishes a *prima facie* case, then a legal presumption of discrimination arises and the burden shifts to defendant to articulate a legitimate, non-discriminatory reason for its challenge actions. *Chapman v. A-one Transport*, 229 F. 3d 1012, 1024 (11th Cir. 2000). Upon proffer by defendant of a legitimate, non-discriminatory reason, the legal presumption of discrimination disappears and the burden shifts back to plaintiff. *Id.* at 1024-1025. Plaintiff must then present evidence sufficient to show that there are genuine issue of material fact as to the truth or falsity of the defendant's proffer legitimate, non-discriminatory reasons and whether defendant unlawfully discriminated against him. *Id.* (R1-42-8-9)

Evidence that similarly-situated employees, such as Lowery and Reeves in the instant case, were disciplined more leniently than appellant is admissible to support a disparate treatment claim when the plaintiff has established that the co-employees are in fact similarly situated. *See*

Anderson v. WBMG-42, 53 F. 2d 561-565 (11th Cir. 2001). The evidence used to establish the plaintiff's *prima facie* case may also rebut the Defendant's non-discriminatory explanation of the employment decision. *Combs v. Plantation Patterns*, 106 F. 3d 1519, 1528-1529 (11th Cir. 1997) .

There was also the evidence of what happened to Randy Williams, the Assistant Superintendent under Richard Singleton. The evidence of what happened tc Randy Williams clearly supports an inference that John Tallon was racially motivated in dealing with the Singleton incident. There was no reason, other than race, for him to single out Randy Williams for constructive discharge via the humiliating demotion that he offered Williams through Leeks. Randy Williams was ordered by Tallon to take a demotion from Assistant Warden to entry-level, Juvenile Corrections Officer. The only basis for this action is the color of Randy Williams' skin. This is what Randy Williams' testified. Tallon did not testify, therefore, there is no evidence from which the jury could infer anything other than the racial motivation of John Tallon in demoting Randy Williams. The action of Tallon was essentially constructive discharge of Williams knowing he could not accept the insulting nature of the demotion.

In the instant case, the trial court instructed the jury that:

> first, in order to prevail on his claim, the plaintiff must prove each of the

following facts by a preponderance of the evidence:

> first, that the plaintiff was discharged from employment by the defendant;
>
> second, that the plaintiff's race was a substantial or motivating factor that motivated the defendant to take that action.

(R2-146-144).

Appellant submits that the following instruction should have been given:

PROPOSED JURY INSTRUCTION NO. 1 – RACE DISCRIMINATION

> In order to prevail on his claim, plaintiff must show that his race was a motivating factor in the Florida Department of Juvenile Justice's decision to terminate his employment. Plaintiff is only required to show that his race was a motivating factor in the decision. He does not have to show it was the only factor in the Florida Department of Juvenile Justice's decision. If the Florida Department of

Juvenile Justice has offered a non-discriminatory reason for its action and you believe that reason or reasons, then your verdict should be for the Florida Department of Juvenile Justice. If, however, you do not believe this reason or reasons were the real reason for the action, then you may find the plaintiff has proved his claim of intentional discrimination if you find that his race influenced the decision.

In determining whether race was a substantial or motivating factor that motivated the defendant, you may consider the following factors:

1. Richard Singleton is an African-American and, as such, is a member of a protected class under Title VII of the Civil Rights Act of 1964.
2. Richard Singleton was subjected to an adverse employment action when he was terminated in July 2004.
3. Richard Singleton was qualified for the position of Superintendent.
4. Richard Singleton was replaced by Mary Zahasky, a white female

who was less qualified than him.

5. The Florida Department of Juvenile Justice treated similarly-situated white employees, James Lowery and Warren Reeves, more favorably than it treated Richard Singleton for engaging in similar conduct.
6. Randy Williams was an African American and a member of a protected class.
7. Randy Williams was qualified for the position of Assistant Superintendent.
8. Randy Williams was subjected to an adverse action in that he was told to accept a demotion or be terminated
9. Randy Williams was replaced by Warren Reeves, a white male, who was less qualified for the position of Assistant Superintendent.
10. John Tallon, a white male, made a

recommendation to terminate the plaintiff's employment prior to the receipt of the independent investigation by Secretary Schembri.

11. John Tallon made the decision to demote Randy Williams and did not offer any legitimate, non-discriminatory reason for the decision.

If you find the plaintiff has proven his *prima facie* case of discrimination by a preponderance of the evidence and if the Florida Department of Juvenile Justice does not meet its burden of producing a legitimate, non-discriminatory reason for the alleged disparity and disciplinary actions, then you must render a verdict for the plaintiff.

If, however, you find the Florida Department of Juvenile Justice has articulated a legitimate, non-discriminatory reason for its actions, then you must determine whether such reason is pretextual. In determining whether the Florida Department of Juvenile Justice's explanation for its decision to terminate the plaintiff was worthy of belief, you may still consider the

evidence supporting plaintiff's *prima facie* case and inferences drawn therefrom.

Plaintiff submits that these jury instructions more adequately reflect the evidence presented at trial and inform the jury of the law in the case, rather than mislead it.

In the evidence presented to the jury, it is undisputed that plaintiff was (1) African American, (2) qualified for the position, and (3) terminated and replaced by a less-qualified, white female. Moreover, the evidence is also undisputed that similarly-situated, white employees, Warren Reeves and James Lowery, engaged in similar conduct to that of the plaintiff, which was more egregious than the plaintiff's conduct, and were not disciplined at all. Finally, the evidence was also uncontradicted that Randy Williams was (1) African American, (2) qualified to hold the position of Assistant Superintendent, (3) subjected to an adverse employment decision that he be demoted to an entry-level position and (4) also replaced by a less-qualified, white male, Warren Reeves. The decision to demote Randy Williams was made by John Tallon. The Florida Department of Juvenile Justice did not even attempt to offer an explanation for a legitimate, non-discriminatory business reason for the demotion of Randy Williams. Therefore, the jury should have been instructed to consider the role that race played in the decision of John Tallon to demote Randy Williams as evidence that Tallon acted in a similar manner in making the recommendation to terminate the employment

of Appellant, Richard Singleton. Appellant submits that had such an instruction been submitted to this jury, the jury would have returned a verdict in favor of the Singleton. These jury instructions more adequately reflect the evidence presented at trial and inform the jury of the law in the case, rather than mislead it. Appellant is aware of this Court's holding in *Combs, supra*, which suggest a contrary result.

Moreover, the jury instructions given in this case did not adequately address the theory advanced by Singleton regarding the effect of John Tallon's discriminatory motives in making his recommendation to terminate the plaintiff. This theory was recognized by the trial court in denying the defendant's Motion for Judgment as a Matter of Law at the conclusion of the case, wherein the court found that ,

> 1. Disparate treatment analysis requires none of the participants in the decision-making process be influenced by racial bias. *Jones v. Gerwens*, 874 F. 2d 1534, 1541, n.13 (11th Cir. 1989).
>
> 2. The evidence presented at trial show that Regional Director John Tallon participated in the decision to fire plaintiff by recommending that plaintiff be fired.
>
> 3. A reasonable jury could infer that Regional Director Tallon's

> recommendation was influenced by racial bias given plaintiff's testimony and Regional Director Tallon's disparate discipline of James Lowery for conduct that is not materially different than the conduct for which plaintiff was fired.
>
> 4. Although the ultimate decision to fire plaintiff was made by Assistant Secretary Charles Chervanik and Secretary Anthony Schembri, there is no indication that either Assistant Secretary Chervanik or Secretary Schembri conducted an independent evaluation of Regional Director Tallon's recommendation. The Office of Inspector General initiated an investigation, but plaintiff was fired before the investigation was completed. A reasonable jury could infer that Assistant Secretary Chervanik and Secretary Schembri acted as a "cat's paw" "or rubberstamp" for Regional Director Tallon's recommendation to fire plaintiff. *Stimpson v. City of Tuscaloosa*, 186 F. 3d 1328, 1332 (11th Cir. 1999)

(R1-122-1-2).

The jury instructions also failed to instruct the jury on how to properly evaluate the role that

John Tallon played in plaintiff's termination. A review of the jury instructions given in this case, shows that the only question asked is if the plaintiff's race was a substantial or motivating factor that motivated the defendant to terminate the plaintiff. The instruction given created the misleading construction that if Secretary Schembri, the man who made the ultimate decision, was not motivated by race, but rather simply the fact that there had been a charge of battery filed by Della Barnes, then the jury could quickly conclude that race played no factor in the case. However, this is contrary to *Jones v. Gerwens*, 874 F. 2d 1534, 1541 (11th Cir. 1989), and *Anderson, supra*, at 566, which hold that "the motivations of both the [upper management] and the [middle management] are pertinent." *Id.* These cases correctly state that disparate treatment analysis requires none of the participants in the decision-making process be influenced by racial bias. The instructions given to this jury, ignored this crucial point of law and could have simply allowed the jury to conclude that even though John Tallon may have been motivated by race in forming his recommendation to Schembri, there was no evidence of racial motivation to explain Secretary Schembri's action. However, we know that John Tallon's role in making a recommendation infused the ultimate decision with racial bias because Secretary Schembri acted prior to the conclusion of an independent investigation which could have removed the taint of racial bias. The plaintiff's trial was fundamentally flawed by the failure of the jury instructions to take into account the "cats paw" theory of liability as set

forth in *Stimpson v. City of Tuscaloosa*, 186 F. 3d 1328, 1332 (11th Cir. 1999), and for that reason, this case should be reversed. This was specifically the argument of plaintiff's counsel in closing argument.

> Then we look at Mr. Tallon's motivation, the man who signed that piece of paper and we can infer his motivations and the way we can infer his motivations is that we look at Mr. Lowery's situation. Think about that. You have Mr. Lowery, you have heard from Mr. Reeves, that guy has a pretty good track record for being a screw up. He doesn't treat people nice. He gets in trouble for it. I believe there is some testimony he falsified some stuff. That's when Mr. Ellis testified that he didn't even want him working on his timesheet because Mr. Lowery had gotten into trouble for falsifying the – – for being like that.
>
> Anyway, so they got the situation where clearly there was an act of violence, no a serious act of violence, but an act of violence and, you know, Mr. Howell, he went through this long thing with attachments to the termination letter about, you know, what constitutes conduct unbecoming and those things.

Well, you'll have that document. You can read it and it will clearly go into great detail, probably more detail that you want or need to know, but in that document you'll see that what Mr. Lowery did clearly met all of these definitions and yet, he not only walks out of that situation with the — even though Mr. Reeves tried to recommend that he be demoted. He was still a supervisor when they got done. James Lowery gets six weeks later in April, he gets a 4.67-out-of-5 evaluation. You know, I guess he could argue, well, if it hadn't been for the situation with Curtis Ellis, I would have given him a 5. He could argue that, but when you compare it to what Mr. Singleton experienced when he brought the place up to deemed status, he got a 2.5, he said got no credit at all, refused to sign it, got no credit and yet a guy commits what Mr. Elonis says is a crime and he gets a 4.67 six weeks later, keeps his job. No harm, no foul. Because they decided in house, just among us white folks, let's settle this so everybody comes out happy. Happy is Mr. Lowery, nothing happens to him. The boys upstairs above Mr. Tallon don't even need to know about this It gets no farther than Mr. Tallon, Mr. Lowery keeps his job.

(R2-146-110-112). The jury was never told that racial motivation by anyone in a chain of command flaws the entire decision making process. This is especially so where Schembri did not have the benefit of an independent investigation until after the decision to terminate Singleton had been made. All Schembri had was the recommendation of John Tallon. The same John Tallon who demeaned and insulted Richard Singleton. The same John Tallon who essentially terminated Randy Williams without cause. The same John Tallon who decided that James Lowery did not need to be punished in any way, much less demoted. Here, however, the jury was never given an opportunity to assess this fly in the ointment–the motivations of John Tallon–they were left with the motivations of Secretary Schembri, who acted without the benefit of an independent investigation as required by *Stimpson*, *supra*. That is the fundamental flaw in these jury instructions and in this case. This case should be reversed and remanded for a new trial.

CONCLUSION

For the reasons stated herein, Petitioner hereby requests the Court grant the writ of certiorari and reverse the decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED MAY 15, 2009

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 08-13238
Non-Argument Calendar

D.C. Docket No. 06-00107-CV-4-SPM

Richard SINGLETON,

Plaintiff-Appellant,

versus

STATE OF FLORIDA DEPARTMENT OF JUVENILE JUSTICE,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Florida

(May 15, 2009)

Before BIRCH, HULL and FAY, Circuit Judges.

Appendix A

PER CURIAM:

Richard Singleton, a black man, appeals the judgment in favor of the State of Florida Department of Juvenile Justice ("DJJ") on his claim that employees of the DJJ terminated him from his position as superintendent of a juvenile justice facility because of his race, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. ("Title VII"). Singleton argues that the jury instructions were plainly erroneous because they misled the jury and left the jury to speculate on an essential point of the law. For the reasons set forth below, we affirm.

I.

At trial, the district court used Eleventh Circuit Pattern Jury Instructions (Civil), 1.2.1 and instructed the jury, in pertinent part, as follows:

> In this case the plaintiff makes a claim under the Federal Civil Rights statutes that prohibit employers from discriminating against employees in the terms and conditions of their employment because of the employee's race.
>
> More specifically, the plaintiff claims that he was demeaned, unfairly scrutinized and ultimately discharged from employment by the defendant because of his race. When a governmental agency is involved, of course, it

may act only through people as its employees; and, in general, a governmental agency is responsible under the law for any of the acts and statements of its employees that are made within the scope of their duties as employees of that governmental agency.

The defendant denies that the plaintiff was discriminated against in any way and asserts that all actions taken and decisions made were for legitimate non-discriminatory reasons and that if any actions or decisions included discriminatory motives, the same actions and decisions would have been taken anyway.

In order to prevail on his claim, the plaintiff must prove each of the following facts by a preponderance of the evidence:

First: That the plaintiff was discharged from employment by the defendant; and

Second: That the plaintiff's race was a substantial or motivating factor that prompted the defendant to take that action.

. . .

. . .

On the other hand, it is not necessary for the plaintiff to prove that the plaintiff's race

> was the sole or exclusive reason for the defendant's decision. It is sufficient if the plaintiff proves that race was a determinative consideration that made a difference in the defendant's decision.
>
> If you find in the Plaintiff's favor with respect to each of the facts that the Plaintiff must prove, you must then decide whether the Defendant has shown by a preponderance of the evidence that the Plaintiff would not have been discharged for other reasons even in the absence of considerations of the Plaintiff's race. If you find that the Plaintiff would have been dismissed for reasons apart from the Plaintiff's race, then you will make that finding in your verdict.

The jury returned a verdict finding that "the fact that [Singleton] was black was [not] a substantial or motivating factor that prompted the Defendant to fire [him]."

II.

When the parties do not dispute that the appellant failed to object to the jury instructions before the jury's deliberations, as here, we review the jury instructions for plain error only. *See United States v. Massey*, 89 F.3d 1433, 1442 (11th Cir. 1996). Under plain error review, we may correct an error if we finds (1) an error, (2) that is plain, (3) that affected the appellant's substantial

rights, and (4) that seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *United States v. Rodriguez*, 398 F.3d 1291, 1298 (11th Cir. 2005). Specifically regarding jury instructions, "[p]lain error review is an extremely stringent form of review" and "reversal for plain error will occur only in exceptional cases where the error is so fundamental as to result in a miscarriage of justice." *Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1329-30 (11th Cir. 1999). To demonstrate that jury instructions were plainly erroneous, an appellant must prove that the challenged instruction was an incorrect statement of the law, misled the jury, or left the jury to speculate as to an essential point of law. *Id.* The incorrect statement must have been so prejudicial as to affect the outcome of the proceedings. *Id.*

III.

Although Singleton does not argue as much, we initially note that, in all relevant aspects, the jury instructions were not a misstatement of law, as they tracked the language of the Eleventh Circuit Pattern Jury Instructions (Civil), 1.2.1. *See Farley*, 197 F.3d at 1329-30. Although the final paragraph of instructions above contains an error, in that the district court should have instructed, "You must then decide whether the Defendant has shown by a preponderance of the evidence that the Plaintiff *would* have been discharged for other reasons even in the absence of considerations of the Plaintiff's race," this error did not affect the outcome of the trial because the jury found that

Singleton had not shown that his race was a factor in his termination and, therefore, never reached the part of its analysis that required determining whether the DJJ would have made the same decision even were it not motivated by his race. *See* Eleventh Circuit Pattern Jury Instructions (Civil), 1.2.1; *Farley*, 197 F.3d at 1329-30.

Singleton first argues that the jury instructions misled the jury. He explains that he presented evidence that John Tallon, his supervisor, recommended to upper management that Singleton be fired and that upper management merely "rubber stamped" Tallon's recommendation. He asserts that the jury instructions did not inform the jury that it must consider the discriminatory motives of *all* decision-makers, rather than simply the final decision-makers, and created the impression that the jury should find in favor of the DJJ if it found that upper management was not itself racially motivated, even if it believed that Tallon was himself motivated by race. However, the jury instructions instructed the jury that it must determine whether the plaintiff's race motivated "the defendant," or the JDD, and explained that a governmental agency defendant, like the JDD, was responsible for any acts or statements of its employees. Therefore, the jury instructions did not plainly create an impression that upper management's motivations were all that mattered for deliberation. Instead, the jury instructions adequately advised the jury that its deliberations should include the motivations of any relevant employee.

Singleton next argues that the jury instructions left the jury to speculate on an essential point of law. Singleton explains that he presented evidence that Tallon also demoted another black employee because of that employee's race. Singleton asserts that the jury should have been instructed to consider the role that race played in Tallon's decision to demote that other black employee as evidence that he acted in a similar manner in recommending Singleton's termination. However, Singleton has not pointed to, and we cannot find, any case law deeming evidence of other discriminatory acts an "essential" part of proving discriminatory termination. Therefore, any error in this regard was not plain. *See Rodriguez*, 398 F.3d at 1298. Accordingly, because the jury instructions were not a miscarriage of justice, we affirm.

AFFIRMED.

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No. 09-51

Supreme Court, U.S.
FILED
AUG 4 - 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

RICHARD SINGLETON,

Petitioner,

v.

STATE OF FLORIDA,
DEPARTMENT OF JUVENILE JUSTICE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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QUESTION PRESENTED

Respondent State of Florida, Department of Juvenile Justice adopts the Petitioner's Questions Presented, as follows:

> Whether the trial court improperly instructed the jury on the plaintiff's burden in the case involving racial discrimination in employment.

PARTIES TO THE PROCEEDINGS

Respondent State of Florida, Department of Juvenile Justice adopts the statement of the List of Parties in the Petition, as follows:

RICHARD SINGLETON, *Petitioner*

STATE OF FLORIDA, DEPARTMENT OF JUVENILE JUSTICE, *Respondent*

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit that is the subject of this petition is unpublished and appears at Appendix A to Respondent's Brief in Opposition.

STATEMENT OF JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Eleventh Circuit were entered on May 15, 2009. Petitioner filed a certiorari petition on July 10, 2009. Petitioner invokes the jurisdiction of the Court under 28 U.S.C. § 1254(1) to review the final judgment entered on May 15, 2009.

STATEMENT OF THE CASE

I. Procedural History

The Petitioner, Richard Singleton, filed this action on February 13, 2006, in the Second Judicial Circuit for Leon County, Florida and the case was subsequently removed to federal court on March 2, 2006, by the Respondent, State of Florida, Department of Juvenile Justice. (R-1). The complaint alleged violations of 42 U.S.C. § 2000e et seq. against the Respondent. (R-1). The Defense filed its Answer and Affirmative Defenses on March 10, 2006. (R-4). On August 8, 2006, Erika Bush filed a Notice of Appearance on behalf of the Plaintiff. (R-12).

The case was first set for trial on February 20, 2007, (R-36), but was continued until June 11, 2007, on request of the Plaintiff. (R-47, R-50). On June 4, 2007, the Plaintiff's counsel filed an Emergency Motion to Withdraw as Attorney for the Plaintiff, (R-79), which was granted the following day by the trial judge, canceling the scheduled trial. (R-85). The Plaintiff was given until August 6, 2007, to find a new attorney. (R-85). On July 13, 2007, Gary Printy filed a Notice of Appearance on behalf of the Plaintiff. (R-89). The trial was set for December 10, 2007, (R-97), but on November 8, 2007, the trial was again continued. (R-105). Jury trial was re-set for May 12, 2008. (R-110). The trial lasted for three days and the verdict was entered on the fourth day. (R-127).

The district court provided clear and detailed charges to the jury, including charges on the race discrimination claim and burden of proof. (R-146-140-149). The source of these instructions was the Eleventh Circuit's pattern jury instructions (Civil Cases), 11th Cir. Federal Claims Instructions ("FCI") 1.2.1, with minor changes. (R-124-1). The jury returned a verdict for the defendant. (R-127-1).

On June 2, 2008, a Notice of Appeal was filed in the Court of Appeals for the Eleventh Circuit. The Eleventh Circuit heard the same argument to prove the same question Petitioner presents here. On May 15, 2009, the Eleventh Circuit entered judgment for the Appellee and later issued the mandate on June 16, 2009. This petition was filed on July 10, 2009 by

Petitioner, Richard Singleton and docketed July 15, 2009.

II. Facts Relevant to the Petition

The Petitioner, Mr. Richard Singleton, began his employment with the Department of Juvenile Justice (hereinafter "DJJ") as the Superintendent of the Jackson Juvenile Offender Correction Center (hereinafter "J-JOCC") in Jackson County, Florida, in June, 1999, (R-145-35). The Petitioner was terminated on July 6, 2004, pursuant to an incident that occurred on the premises of the J-JOCC facility on June 28, 2004, where the Petitioner placed his hands on a young African-American female kitchen worker without her permission (R-145-46, 56). The victim, Della Barnes, was not an employee of the Department, but instead was an employee of Trinity Food Services that the Department contracted with to provide kitchen services. (R-146-12). In response to the incident, Ms. Barnes filed a criminal police report, alleging battery. (R-146-17-19). Because Mr. Singleton was charged with a violation of state criminal law, the Assistant Secretary of DJJ, Charles Chervanik, and others with decision-making authority made the decision to terminate his employment with the department. (R-145-178). Mr. Singleton testified on his behalf and, when cross-examined, he stated that he did touch Ms. Barnes and he knew that this was inappropriate. (R-145-96). Furthermore, Mr. Singleton testified that he was aware of department policies which permitted any

DJJ employee to be terminated due to a violation of criminal law. (R-145-96).

During the defense's case in chief, two African-American supervisors of DJJ juvenile corrections facilities testified. Ed Leeks testified that he was asked to take over the position of superintendent of J-JOCC immediately after Mr. Singleton was terminated. (R-145-158-59). Oliver Jones testified that he never experienced any discriminatory behavior while employed with DJJ. (R-145-166-67).

Appellant had opportunities to object to the trial court's proposed jury instruction, suggest modifications, or submit his own instructions. On May 25, 2007, Plaintiff filed what was denominated as "Plaintiff's Requested Jury Instruction No. 1, Title VII – Civil Rights Act Race Discrimination; Including Same Decision Defense." (R-61).

On the first day of trial, the district court furnished detailed jury instructions to both counsel for Plaintiff and Defendant and requested that attorneys for both sides submit changes or modifications.[1] (R-144-9-10).

---

[1] The trial court stated:

> I have a verdict form and instructions. Have both sides had an opportunity to review the instructions and the verdict form? She is going to give them to you, and look them over after we recess this evening and let me know if you would like to request any changes or modifications.

On the second day of trial, the district court asked counsel for both sides whether each had an opportunity to review the jury instructions.[2] (R-145-8). Subsequently, the district court asked whether either party had any changes or modifications to the jury instructions and the Plaintiff indicated he did not, as did Defendant.[3] (R-145-9).

On the third day of trial, the district court informed the parties "Counsel, it will be the Court's intention to read the set of instructions to the jury upon their return and review the verdict form with them and send them out to deliberate." (R-146-139). Whereupon, the district court proceeded to distribute copies of the jury instructions and verdict form and read both to the jurors. (R-146-140-149). The jury instruction read to the jurors were the same instructions distributed to counsel for the parties on the first day of trial. (R-124). The following day, the jury returned with the verdict in favor of the Defendant-Appellee.

---

[2] THE COURT: . . . Have each of you had the opportunity to review the jury instructions and the verdict form? The Plaintiff?

MR. PRINTY: Yes, Your Honor.

[3] THE COURT: Any changes or modifications?

MR. PRINTY: No objections, changes or modifications.

MR. HOWELL: No objections, Judge.

III. The Opinions Below

The jury verdict returned on May 15, 2008 showed that the jury did not find, from a preponderance of the evidence, that the fact that the Plaintiff is black was a substantial or motivating factor that prompted the Defendant to fire Plaintiff. This finding precluded the evaluation of further issues put before the jury on the verdict form. Essentially, no change in the jury instructions would create a different result because Plaintiff did not sufficiently prove the essential first point of law, that the DJJ was motivated by Petitioner's race.

On appeal to the Eleventh Circuit, the sole question presented was whether the trial court improperly instructed the jury as to the Plaintiff's burden of proof. The court reviewed the case for plain error only because it is entirely undisputed that no objections were made to the jury instructions at trial. *Farley v. Nationwide Mutual Insurance Co.*, 197 F.3d 1322, 1329 (11th Cir. 1999). The Court, in the opinion dated May 15, 2009, stated that:

> "reversal for plain error will occur only in exceptional cases where the error is so fundamental as to result in a miscarriage of justice." Farley v. Nationwide Mut. Ins. Co., 197 F.3d 1322, 1329-30 (11th Cir.1999). To demonstrate that jury instructions were plainly erroneous, an appellant must prove that the challenged instruction was an incorrect statement of the law, misled the

> jury, or left the jury to speculate as to an essential point of law. Id.

In its evaluation of the arguments asserted by the appellant, the court found that the jury instructions did not misstate the law or mislead the jury because they simply instructed the jury to examine the motives and actions of the "defendant." This was not a misstatement of the law because it did not create an impression that only upper management's motives were to be considered, but rather the entire DJJ including all relevant employees.

As for the argument that the jury was left to speculate on an essential point of law, the court held that, "Singleton has not pointed to, and we cannot find, any case law deeming evidence of other discriminatory acts an 'essential' part of proving discriminatory termination." The Eleventh Circuit found no plain error in its review of the case and held that the jury instructions were not a miscarriage of justice.

ARGUMENT

CERTIORARI IS NOT WARRANTED BECAUSE PETITIONER FAILED TO OBJECT TO THE JURY INSTRUCTIONS BEFORE APPEAL AND THE DISTRICT COURT SUFFICIENTLY INSTRUCTED THE JURY ON PLAINTIFF'S BURDEN OF PROOF FOR HIS CLAIM

Petitioner, Richard Singleton, seeks a writ of certiorari from the May 15, 2009 opinion of the Eleventh Circuit affirming the district court judgment in favor of Respondent, State of Florida Department of Juvenile Justice. Petitioner presents one question, whether the jury instructions given by the trial court improperly instructed the jury on the Plaintiff's burden. This question was presented to the Eleventh Circuit as well but the trial court never heard an objection to the instructions which means the Petitioner failed to preserve the issue for appeal.

Petitioner draws attention away from the single issue presented which is if the jury instructions used at trial improperly instructed the jury on the burden of proof for the Plaintiff. The jury instructions were plainly written, tracked the Eleventh Circuit's pattern jury instructions, and were not a misstatement of law. Other alleged discriminatory acts are not an essential element to prove racial discrimination in this case. Proposing new jury instructions on appeal is not the proper time to raise such an issue. Petitioner took too long to realize he had concerns about the jury instructions and should be barred from

any relief under Rule 51 of the Federal Rules of Civil Procedure.

Dissatisfaction with the verdict does not allow a party to challenge the jury instructions on appeal. This Court has said that it will not ordinarily "decide questions not raised or litigated in the lower courts." *City of Springfield, Mass. v. Kibbe,* 480 U.S. 257, 259 (1987). Also, this rule has "special force where the party seeking to argue the issue has failed to object to a jury instruction." *Id.* On appeal to the Eleventh Circuit, it was undisputed that no objections to the trial court's jury instructions were made. (R-145-9) On two separate days, both Plaintiff and defendant were given a chance by the court to object to the jury instructions.

This is not a case where Plaintiff requested a jury instruction that the trial court refused to give. It is a case where Plaintiff never even made an objection or requested modification.

A clear and concise reading of the trial transcript from May 13, 2008, the second day of trial, shows Plaintiff's counsel had no objections, changes or modifications to the trial judge's instructions:

> THE COURT: Have each of you had the opportunity to review the jury instructions and the verdict form? The Plaintiff?
>
> MR. PRINTY: Yes, Your Honor.
>
> THE COURT: Any changes or modifications?

> MR. PRINTY: No objections, changes or modifications.
>
> MR. HOWELL: No objections, Judge.

(R-145-8-9). Plaintiff was offered another chance to object to the jury instructions on May 14, 2008, the third day of trial:

> THE COURT: All right. I went through the jury instructions and we re-arranged one, and I asked my law clerk to give you the revised set. Have you received it?
>
> MR. PRINTY: Yes, Your Honor.
>
> MR. HOWELL: Yes, Your Honor.
>
> THE COURT: Any problems with that?
>
> MR. HOWELL: None from the defendant.
>
> MR. PRINTY: I didn't see any problems, Your Honor.
>
> THE COURT: All right. Well, that will be the Court's instructions to the jury.

(R-146-5-6).

Petitioner provides jury instructions in his argument, but this adds nothing to the argument of whether the jury instructions used were improper. The time to propose new jury instructions was at trial, when the court gave multiple opportunities to do so. The procedural history above shows that the trial date was postponed several times. Petitioner cannot reasonably make the argument that there was

not enough to prepare his own jury instructions or that he did not have enough time to review the instructions provided by the court.

Petitioner presents this Court with the sole task of evaluating whether the trial court improperly instructed the jury on the Plaintiff's burden. Petitioner contends that the instructions should have specified precisely whose motives should be considered in the evaluation by the jury. The Eleventh Circuit held that the language used in the jury instructions was not misleading because they instructed the jury to consider the motives of "the defendant" and "explained that a governmental agency defendant, like the JDD [sic] was responsible for any acts or statements of its employees." (Appendix A). This clearly and plainly instructs the jury to consider any employee, not just upper management as the Petitioner contends.

Petitioner asserts next that the jury was left to speculate on an essential point of law because he presented evidence at trial of other discriminatory acts by Respondent. Petitioner, in his own argument, describes the burden shifting method for discrimination cases and the requirements to prove a discriminatory termination, but nowhere is it described that other discriminatory acts are an essential element. The Eleventh Circuit held that, "Singleton has not pointed to, and we cannot find, any case law deeming evidence of other discriminatory acts an "essential" part of proving discriminatory termination." (Appendix A).

Finally, even if Petitioner's new proposed jury instructions permitted, it is doubtful they would have any effect on the outcome of the case. The jury found that the race of Petitioner was not a substantial or motivating factor in his termination. This finding kept the jury from having to move forward with the analysis of the issues. Clearly, changing the jury instructions would not have changed the outcome because all issues dependent on that first decision by the jury would have been moot. The jury was given time during trial to evaluate the testimony of witnesses, including former Assistant Secretary of DJJ, who testified that Richard Singleton was terminated due to a violation of criminal law, (R-145-178), and that race was not a factor in this determination. The jury heard this testimony, weighed the issues and facts presented during trial, and made a decision in favor of the State of Florida Department of Juvenile Justice. This result was based on the jury applying a proper statement of law to evaluate the facts of the case and a different outcome would not have resulted even with Petitioner's proposed jury instructions.

CONCLUSION

For the reasons set forth in the foregoing pages, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-13238
Non-Argument Calendar

D. C. Docket No. 06-00107-CV-4-SPM

RICHARD SINGLETON,

Plaintiff-Appellant,

versus

STATE OF FLORIDA
DEPARTMENT OF JUVENILE JUSTICE,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Florida

(May 15, 2009)

Before BIRCH, HULL and FAY, Circuit Judges.

PER CURIAM:

Richard Singleton, a black man, appeals the judgment in favor of the State of Florida Department of Juvenile Justice ("DJJ") on his claim that employees of the DJJ terminated him from his position

as superintendent of a juvenile justice facility because of his race, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. ("Title VII"). Singleton argues that the jury instructions were plainly erroneous because they misled the jury and left the jury to speculate on an essential point of the law. For the reasons set forth below, we affirm.

I.

At trial, the district court used Eleventh Circuit Pattern Jury Instructions (Civil), 1.2.1 and instructed the jury, in pertinent part, as follows:

> In this case the plaintiff makes a claim under the Federal Civil Rights statutes that prohibit employers from discriminating against employees in the terms and conditions of their employment because of the employee's race.
>
> More specifically, the plaintiff claims that he was demeaned, unfairly scrutinized and ultimately discharged from employment by the defendant because of his race. When a governmental agency is involved, of course, it may act only through people as its employees; and, in general, a governmental agency is responsible under the law for any of the acts and statements of its employees that are made within the scope of their duties as employees of that governmental agency.

The defendant denies that the plaintiff was discriminated against in any way and asserts that all actions taken and decisions made were for legitimate non-discriminatory reasons and that if any actions or decisions included discriminatory motives, the same actions and decisions would have been taken anyway.

In order to prevail on his claim, the plaintiff must prove each of the following facts by a preponderance of the evidence:

First: That the plaintiff was discharged from employment by the defendant; and.

Second: That the plaintiff's race was a substantial or motivating factor that prompted the defendant to take that action.

. . .

. . .

On the other hand, it is not necessary for the plaintiff to prove that the plaintiff's race was the sole or exclusive reason for the defendant's decision. It is sufficient if the plaintiff proves that race was a determinative consideration that made a difference in the defendant's decision.

If you find in the Plaintiff's favor with respect to each of the facts that the Plaintiff must prove, you must then decide whether the Defendant has shown by a preponderance of the evidence that the Plaintiff would not have been discharged for other

> reasons even in the absence of considerations of the Plaintiff's race. If you find that the Plaintiff would have been dismissed for reasons apart from the Plaintiff's race, then you will make that finding in your verdict.

The jury returned a verdict finding that "the fact that [Singleton] was black was [not] a substantial or motivating factor that prompted the Defendant to fire [him]."

II.

When the parties do not dispute that the appellant failed to object to the jury instructions before the jury's deliberations, as here, we review the jury instructions for plain error only. *See United States v. Massey,* 89 F.3d 1433, 1442 (11th Cir.1996). Under plain error review, we may correct an error if we finds (1) an error, (2) that is plain, (3) that affected the appellant's substantial rights, and (4) that seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *United States v. Rodriguez,* 398 F.3d 1291, 1298 (11th Cir. 2005). Specifically regarding jury instructions, "[p]lain error review is an extremely stringent form of review" and "reversal for plain error will occur only in exceptional cases where the error is so fundamental as to result in a miscarriage of justice." *Farley v. Nationwide Mut. Ins. Co.,* 197 F.3d 1322, 1329-30 (11th Cir.1999). To demonstrate that jury instructions were plainly erroneous, an appellant must prove that the challenged instruction was an incorrect statement of the

law, misled the jury, or left the jury to speculate as to an essential point of law. *Id.* The incorrect statement must have been so prejudicial as to affect the outcome of the proceedings. *Id.*

III.

Although Singleton does not argue as much, we initially note that, in all relevant aspects, the jury instructions were not a misstatement of law, as they tracked the language of the Eleventh Circuit Pattern Jury Instructions (Civil), 1.2.1. *See Farley,* 197 F.3d at 1329-30. Although the final paragraph of instructions above contains an error, in that the district court should have instructed, "You must then decide whether the Defendant has shown by a preponderance of the evidence that the Plaintiff *would* have been discharged for other reasons even in the absence of considerations of the Plaintiff's race," this error did not affect the outcome of the trial because the jury found that Singleton had not shown that his race was a factor in his termination and, therefore, never reached the part of its analysis that required determining whether the DJJ would have made the same decision even were it not motivated by his race. *See* Eleventh Circuit Pattern Jury Instructions (Civil), 1.2.1; *Farley,* 197 F.3d at 1329-30.

Singleton first argues that the jury instructions misled the jury. He explains that he presented evidence that John Tallon, his supervisor, recommended to upper management that Singleton be fired and

that upper management merely "rubber stamped" Tallon's recommendation. He asserts that the jury instructions did not inform the jury that it must consider the discriminatory motives of *all* decision-makers, rather than simply the final decision-makers, and created the impression that the jury should find in favor of the DJJ if it found that upper management was not itself racially motivated, even if it believed that Tallon was himself motivated by race. However, the jury instructions instructed the jury that it must determine whether the plaintiff's race motivated "the defendant," or the JDD, and explained that a governmental agency defendant, like the JDD, was responsible for any acts or statements of its employees. Therefore, the jury instructions did not plainly create an impression that upper management's motivations were all that mattered for deliberation. Instead, the jury instructions adequately advised the jury that its deliberations should include the motivations of any relevant employee.

Singleton next argues that the jury instructions left the jury to speculate on an essential point of law. Singleton explains that he presented evidence that Tallon also demoted another black employee because of that employee's race. Singleton asserts that the jury should have been instructed to consider the role that race played in Tallon's decision to demote that other black employee as evidence that he acted in a similar manner in recommending Singleton's termination. However, Singleton has not pointed to, and we cannot find, any case law deeming evidence of

other discriminatory acts an "essential" part of proving discriminatory termination. Therefore, any error in this regard was not plain. *See Rodriguez,* 398 F.3d at 1298. Accordingly, because the jury instructions were not a miscarriage of justice, we affirm.

AFFIRMED.